KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 180**

Date: **2025 10 24**
File No.: KBG-MF-00015-2025
Judicial Centre: Melfort

BETWEEN:

VITERRA CANADA INC.

APPELLANT

- and -

TOBIN LAKE FARMS LTD.

RESPONDENT

Counsel:

Allen T. Berriault and Carter T. Bezugly	for the appellant Viterra
Grant Carson	for the respondent Tobin Lake

JUDGMENT
October 24, 2025

TURCOTTE J.

I. INTRODUCTION

[1] This is an appeal brought pursuant to s. 44 of *The Small Claims Act, 2016*, SS 2016, c S-50.12. The appellant, Viterra Canada Inc. [Viterra], appeals a judgment of a Provincial Court judge [trial judge] who granted judgment against it after trial. See *Tobin Lake Farms Ltd. v Viterra Canada Inc.*, 2025 SKPC 2.

[2] The respondent, Tobin Lake Farms Ltd. [Tobin Lake], sued Viterra for money claimed to be owed under a Grain Purchase Agreement entered into between the parties on December 9, 2021 [GPA]. Tobin Lake alleged that it contracted with Viterra

to deliver malt barley to Viterra for an agreed upon price of $470.78 per metric ton and that it substantially fulfilled its contract obligations. It further alleged that Viterra wrongfully paid for the barley at a feed barley or spot price of $361.42 per metric ton.

[3] Tobin Lake claimed $32,068.25, which is the difference between the malt barley price and the feed barley price.

[4] Viterra disputed the claim on the basis that Tobin Lake did not meet its obligation to deliver barley of malt quality. Specifically, Viterra contended that the Tobin Lake barley failed to meet the contract requirement that it have a germination rate of at least 95%. Further, Viterra argued that Tobin Lake's claim was barred by *The Limitations Act*, SS 2004, c L-16.1, because the alleged breach was discovered on January 10, 2022 and the claim was not issued until January 15, 2024.

[5] The trial judge determined that the claim was issued within the two-year limitation period. He further found that Viterra was in breach of the GPA. He awarded Tobin Lake damages of $30,000, the maximum under the Small Claims jurisdiction plus pre-judgment interest of $4,491.78 and "additional costs to the plaintiff in the sum of $3,000, being 10% of the $30,000 award … because Viterra's actions in the early stages of this matter put the plaintiff to unnecessary trouble and expense".

II. GROUNDS OF APPEAL

[6] Viterra appeals the whole of the trial judge's decision. Although ten grounds of appeal are listed, they may be conveniently grouped into three categories:

(1) The trial judge erred in law, or mixed fact and law, by concluding that Tobin Lake's claim was not statute barred;

(2) The trial judge erred in law by making findings of fact not based in

evidence, failed to consider or correctly apply relevant legal principles, misinterpreted the terms of the GPA, and exceeded the Court's jurisdiction by applying legal principles not plead; and

(3) The trial judge erred in law by awarding the maximum costs allowable under *The Small Claims Act, 2016*, SS 2016, c S-50.12, without providing sufficient reasons.

[7] For the reasons that follow, I would allow Viterra's appeal and dismiss Tobin Lake's claim. I have determined that the trial judge erred in law by concluding that the claim was brought within two years of the day on which Tobin Lake's claim was discovered. Because the decision on the limitation period determines this appeal, it is not necessary to address Viterra's other grounds of appeal.

III. ANALYSIS

(a) Background

[8] The salient facts relating to the limitation period are not disputed.

[9] Tobin Lake and Viterra entered into the GPA on December 9, 2021.

[10] Between December 14 and December 16, 2021 Tobin Lake caused to be delivered to Viterra 292.167 tonnes (7 truckloads) of barley under the GPA.

[11] Upon delivery of the barley, Viterra followed its standard procedure, taking two samples from each truckload for testing purposes. Each sample was appropriately marked and labelled. The first sample is sealed [sealed sample] and kept separate so that it can be sent for third party testing if the seller disputes Viterra's internal test results. The second sample is a composite sample from all seven truckloads. The composite sample is then tested in Viterra's internal testing facility. The composite

sample determines the quality of the barley and the price to be paid to the seller by Viterra whether the barley is malt grade or feed grade.

[12] Viterra tested Tobin Lake's barley and found it to have a germination rate of 83%, which is below the acceptable 95% rate necessary for malt barley pursuant to the terms of the GPA. Viterra's standard procedure, when receiving a substandard test result is to re-test. It did that here. The second tests were also all below the acceptable standard of 95%.

[13] Viterra then relayed the results to Tobin Lake. Tobin Lake disputed the results.

[14] In the event of a dispute, the GPA provides that the seller may request independent third party testing, the results of which will be final and binding. The relevant provision of the GPA reads as follows:

> (D) Grade. The Company will determine the weight, grade, moisture content, shrinkage allowance, dockage, and any other specifications in respect of the Crop. If the Seller does not accept the Company's determination of grade, the Company will submit a representative sample of the Crop to the Chief Inspector, Canadian Grain Commission ("CGC"), or to an alternate independent inspection organization, whose decision will be final and binding.

[15] At Tobin Lake's request and in accordance with the GPA, Viterra sent the sealed sample to SGS Canada Inc. [SGS] for independent testing. On January 6, 2022, SGS reported a germination rate of 83%.

[16] On January 10, 2022, Tobin Lake was advised by email that Viterra was not going to pay the malt barley rate because the germination rate was below 95% and it would be relying on the provision of the GPA that states that the test results of the third party is "final and binding". A copy of SGS's sealed sample test result was attached to the email.

[17] The January 10, 2022 email sets forth Viterra's position clearly: they test once, retest if the result is below 95% and, if requested, send a sample to an independent third party, whose results are binding. The relevant portion of that email reads as follows:

> I know you want to wait. But there is nothing that they say that will change the effects on what was delivered to Valparaiso. Its our process germ once and if comes in lower we germ again. You still didn't like results and requested to have it sent to SGS and I told you those numbers are binding. Whatever they get is what gets done.
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> You mentioned there still must be a mistake like the wrong sample sent out. We got 85% on our first test 85% on our second and SGS got 83%. If we sent in wrong sample I don't think we would get the same numbers.

[18] On January 10, 2022, Viterra informed Tobin Lake that it was only prepared to pay feed barley or spot price and not the malt barley rate under the GPA. The evidence at trial established that Viterra requisitioned the cheque for Tobin Lake on January 10, 2022, that it was received by Tobin Lake on February 10 or 11, 2022 and deposited to its account on February 15, 2022.

[19] The trial judge made reference to ss. 5 and 6 of *The Limitations Act* but did not reference s. 18 or any case law. He then went on to conduct a very brief analysis before concluding that the claim was discovered on February 10 or 11, 2022 – when the cheque was received and not January 10, 2022 – when Tobin Lake was told that it was relying upon the initial SGS test and that that initial test was "final and binding". The relevant paragraphs of the trial judge's decision on this point were as follows:

> [71] Through Selena Vachon's communications with Mr. Morris, Tobin Lake would have known by the latter part of December 2021 that Viterra was not ready to pay for its barley at a malt barley price. However, Viterra's view was subject to the terms of the December 9 Grain Purchase Agreement. Paragraph D of the agreement's "Additional Terms and Conditions" provided that if a seller did not accept Viterra's

> grade determination, then Viterra was to "submit a representative sample of the Crop to the Chief Inspector, Canadian Grain Commission (CGC), or to an alternate independent inspection organization, whose decision will be final and binding".
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> [72] In an e-mail Selena Vachon sent to Mr. Morris on January 10, 2022 (Exhibit D-11), Ms. Vachon said, "You still didn't like results and requested to have it sent to SGS and I told you those numbers are binding. Whatever they get is what gets done." It may be that Ms. Vachon's e-mail was referring only to a first composite sample sent to SGS, but it would be the individual truckload samples that had to be assessed before Viterra could know its true position.
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> [73] Viterra delivered the individual truckload samples to SGS on January 21, 2021, and SGS's Janet Roy reported the results on January 24, 2022. Presumably based on the SGS results, Viterra later mailed out cheques for the Tobin Lake barley. Mr. Morris testified that when he received Tobin Lake's cheque on February 10 or 11, 2022, "I noticed that there was quite a bit short." (Viterra's cheque record filed as Exhibit D-15 shows that Tobin Lake's cheque cleared the bank on February 15, 2022.) I accept Mr. Morris's evidence that it was not until he got his cheque that he had confirmation that Viterra would not be paying him the malt barley price for his grain. I find that it was when he received his cheque that his loss was "discovered". Accordingly, as Tobin Lake's claim was made January 15, 2024, I find that it is within the two-year limitation period.

(b) Statutory Framework and Standard of Review

[20] The relevant provisions of *The Limitations Act* are:

> 6(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
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> (a) that the injury, loss or damage had occurred;
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> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;

> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
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> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
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> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.
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> 18 If, in a proceeding, a limitation period is raised against a claimant, the claimant has the burden of proving that:
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> (a) the limitation period has not expired; or
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> (b) there is no limitation period that applies to the claim.
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> 19 If, after the commencement of a proceeding, it is established that a limitation period applicable to the claim had expired before the commencement of the proceeding, the claim is barred and the proceeding shall not be maintained.

[21] Whether a limitation period expired before the issuance of a statement of claim is a question of mixed fact and law. In *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.,* 2020 SKCA 39, 447 DLR (4th) 316 [*Venture Construction*], the Court of Appeal neatly summarized the standard of review principles respecting limitation period cases as follows:

> [33] Whether a limitation period expired before the issuance of a statement of claim is also a question of mixed fact and law: *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 SCR 423 at para 28; *Longo v MacLaren Art Centre*, 2014 ONCA 526 at paras 38-39, 323 OAC 246; *Crombie Property Holdings Limited v McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16 at para 31, 406 DLR (4th) 252; *Miramichi Lumber Products Inc. v Province of New Brunswick*, 2019 NBCA 61 at para 12, 38 CPC (8th) 426; *York University v Markicevic*, 2018 ONCA 893 at para 27, 51 CCEL (4th) 30. The importance, in that analysis, of ascertaining when a claim was discovered or became discoverable gives the question a heavy factual component: *Artis Builders v Kehoe*, 2019 SKCA 14 at paras 3 and 30, [2019] 2 WWR 592; *Asplundh*

> *Canada Inc. v Rousseau*, 2012 SKCA 40 at para 23, 393 Sask R 82; *Kassburg v Sun Life Assurance Company of Canada*, 2014 ONCA 922 at para 40, 379 DLR (4th) 665.
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> [34] In the context of standard of review, "palpable" means an error that is obvious and "overriding" means an error that goes to the very core of the outcome of the case. Palpable and overriding error is not in the nature of a "needle in a haystack", but rather "a beam in the eye": see *Fitzpatrick v Ollenberger*, 2017 SKCA 24 at para 28, [2017] 6 WWR 695, citing *Benhaim v St-Germain*, 2016 SCC 48 at paras 37-39, 402 DLR (4th) 579, quoting *Canada v South Yukon Forest Corporation*, 2012 FCA 165 at para 46, 431 NR 286, and *J.G. c Nadeau*, 2016 QCCA 167 at para 77.

(c) Application of the Standard of Review.

[22] After referring to the critical January 10, 2022 email, the trial judge discounted its obvious meaning by speculating that the email may have been "… referring only to a first composite sample sent to SGS, but it would be the individual truckload samples that had to be assessed before Viterra could know its true position". He then goes on to say that, "[p]resumably based on the [January 24, 2022] SGS results, Viterra later mailed out cheques for the Tobin Lake barley".

[23] With respect, such findings, which were crucial to the trial judge's conclusion on the limitation period issue, are conjecture that is unsupported by the evidence before the Court. The trial judge's speculation amounted to both an error of law, by contributing to a conclusion based on non-existent evidence, and a palpable and overriding error, in that it was an obvious error readily apparent on the record.

[24] First, the email itself does not say what the trial judge said it says. The January 10, 2022 email does not say that Viterra would need to do more testing before it would come up with its final position. Rather, it says, clearly, that it intends to rely on the sealed sample SGS result initiated by following the GPA provisions and that it considered the SGS result to be final and binding.

[25] Second, Selena Vachon, the author of the January 10, 2022 email, testified at trial. She testified that once she received the sealed sample SGS result she made the decision, as Viterra's representative, that the barley did not make malt status, and that Tobin Lake would be paid the lesser amount. This testimony was not shaken or seriously challenged.

[26] Further, the trial judge's statement that Viterra may have been referring to the first composite test and was going to hold off making a final decision, while incorrect and not supported by the evidence, does not properly focus on what Tobin Lake knew or ought to have known. Even if Viterra was going to hold off making a final decision until after further tests (which is contrary to the evidence), this was not what was communicated to Tobin Lake. Ms. Vachon did not testify that she waited until the January 24, 2022 test came in, then made the decision that the barley was not at the malt standard and then mailed out the cheques. There is no evidence to this effect. Rather, she testified that she made the decision on January 10, 2022 based on the SGS test results, sent out the email to Tobin Lake advising it of that decision and then requisitioned the cheque on that same day as corroborated by Exhibit D15.

[27] Ms. Vachon's testimony was also corroborated by Jeffrey Danielson. He testified that the GPA contemplates the test results from the composite sample, and not the individual truck samples, are determinative as to whether the grain delivered met the contract specifications.

[28] In these circumstances, the fact that further tests were completed after January 10, 2022 does not impact the determination of when the limitation period begins. Whether damages may be subsequently remedied or require further calculation, does not delay or change the date that the damages arose. See *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para 30, 29 CLR (5th) 294 [*GHC Realty*].

[29] Viterra notified Tobin Lake of its "final and binding" decision on January 10, 2022. The cheque was requisitioned on January 10, 2022. Notwithstanding that they had already conclusively determined that the barley fell below the 95% acceptance rate, Viterra sent seven individual samples to SGS on January 21, 2022. The tests completed after January 10, 2022 were not completed as ameliorative efforts or to pursue alternate negotiation purposes by Viterra regarding the payment to be made under the GPA to Tobin Lake so as to create "compelling and appropriate reasons" for Tobin Lake to hold off on bringing an action. See *Venture Construction* at para 63; *GHC Realty*, at paras 32-33; and *Fiesta Barbeques Limited v Vomar Industries Inc.*, 2024 SKCA 108 at paras 17-20. Rather, from the testimony of Jeffrey Danielson, the individual tests were done as a courtesy, in an effort to maintain the relationship with Tobin Lake, not to change the decision already made by Viterra. Those tests also showed that the average germination rate of the barley from the individual truckloads fell below the 95% malt barley rate.

[30] Section 18 of *The Limitations Act* states that the claimant, in this case Tobin Lake, has the burden of proving that the limitation period has not expired (*GHC Realty*, para 29). It is clear that on January 10, 2022, Mr. Richard Morris, the operating agent of Tobin Lake, received and read the email from Ms. Vachon of Viterra. The email notified Tobin Lake that Viterra was not going to pay the malt barley rate because the barley was below the 95% benchmark based on the sealed sample tested by an independent third party. The email further advised that Viterra took the position that the result of the third party test was "final and binding" in accordance with the GPA.

[31] It was on January 10, 2022, when Tobin Lake knew or ought reasonably to have known that Viterra was not going to pay the malt barley price. At that point, Tobin Lake possessed sufficient knowledge to satisfy all four elements of s. 6(1) of *The Limitations Act*. Pursuant to s. 6(2), Tobin Lake is presumed to have known of the claim on the date of the act or omission—unless the contrary is proven—which it was not.

Tobin Lake's representative acknowledged this on the stand and, thus, it cannot seriously be disputed that the presumption has not been rebutted.

[32] It is the receipt of the information that payment would be reduced that is important – not the date that Tobin Lake received the cheque. The limitation period is not postponed pending receipt of final documentation or payment; rather it begins when the claimant is aware of the essential facts and the adverse position of the other party. Here, Tobin Lake knew or ought to have known on January 10, 2022 that some non-trivial loss or damage had occurred resulting from an act or omission on the part of Viterra to pay spot price and not malt barley price under the GPA, such that a legal proceeding would be an appropriate means to seek a remedy (*GHC Realty*, paras 30-31).

[33] The trial judge erred by concluding that the limitation period commenced when Tobin Lake received the cheque on February 10 or 11, 2022. On a proper interpretation of the facts and the applicable law, the limitation period commenced on January 10, 2022. The claim was issued on January 15, 2024, which is outside the two-year limitation period established by s. 5 of *The Limitations Act*. Pursuant to s. 19 of *The Limitations Act*, Tobin Lake's claim is statute barred and cannot be maintained.

IV. CONCLUSION

[34] Viterra's appeal is allowed. The trial decision is set aside. Tobin Lake's claim is barred as being commenced outside the limitation period. Viterra is entitled to its costs based on Column 4 of Schedule I-D of the Tariff of Costs.

J.
F.N. TURCOTTE